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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 298

DEFENSE SUPPLIES CORPORATION AND RECONSTRUCTION FINANCE CORPORATION,

Petitioners,

vs.

LAWRENCE WAREHOUSE COMPANY, CAPITOL CHEVROLET COMPANY, V. J. McGREW, and CLYDE W. HENRY,

Respondents.

Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Foreword.

While Capitol Chevrolet Company are each filing separate documents of opposition each incorporates the other by reference as though fully set out herein, in order to avoid duplication.

Comes now Capitol Chevrolet Company, one of respondents herein, and opposes the Petition of the Solicitor General on behalf of the defunct Defense Supplies Corporation and Reconstruction Finance Corporation for a Writ of Certiorari to review the decision of the Ninth Circuit Court of Appeals entered on April 6, 1948, as amended May 13, 1948.

Opinions Below.

The decision and order attempted to be reviewed herein are reported in 168 F. 2d 199. Prior decisions which are vacated by the present decision are reported in 164 F. 2d 773 and 67 Fed. Supp. 16, respectively. The decision of the Ninth Circuit Court of Appeals is reported in the record, pages 396 to 495. Prior opinions are contained in the record, pages 370 to 380 and pages 63 to 75, respectively.

Jurisdiction.

This court is without jurisdiction to entertain the petition.

The alleged petitioner Defense Supplies Corporation is a non-existent corporation and has been by resolution ever since July 1st, 1945, when Congress abolished the same, pursuant to Chapter 215 Public Law 109, 59 Stat. 310, Act of June 30, 1945. The present Reconstruction Finance Corporation was organized June 30, 1947, as amended by the 80th Congress, Public Law 548, Ch. 334, 2nd Session and never has been a party to the action, nor has Congress authorized the present RFC to take over the lawsuits of the prior corporation.

No judgment had been entered in any court prior to the dissolution of the Defense Supplies Corporation by the Act of June 30, 1945. When the trial court attempted to enter judgment there was no corporation then in existence, nor did the attorneys representing the Defense Supplies Corporation have a right to appear for it and to have judg-

ment entered for the said defunct corporation, nor did the trial judge have that right or authority.

No motion was made to substitute the Reconstruction Finance Corporation for it within the period authorized by Congress, nor was there any showing of any kind made at any time to any court on any supplemental motion showing the necessity therefor as required by the Act of Congress.

When the appeal was carried on it was carried on for a dead corporation by attorneys who knew it was dead, and no effort was made to substitute any other corporation, in the mode and manner required by the Congress.

Reconstruction Finance Corporation is without power to appear in the action as it has never been substituted into the case as a party, and no motion has ever been granted by which it is substituted in as a party. Furthermore, the jurisdiction and authority of the Reconstruction Finance Corporation itself lapsed as the powers and duration of the corporation as it existed at the time of the dissolution of the Defense Supplies Corporation lapsed and a new Act was passed by Congress June 30, 1947, known as Reconstruction Finance Corporation Act (June 30, 1947, C. 1, 166 Title 1, Sec. 61 Stat.). No jurisdiction is contained in the new Act for the continuation of any litigation of any corporation or other body taken over under the old act, or for counsel to appear for it or against it. This was solely within the discretion of Congress.

Title 15, Sec. 631 U. S. Code, provides as follows:

"Exercise of powers conferred under prior law. The corporation is authorized to exercise the functions, powers, duties, and authority transferred to the

corporation by Public Law 109, 79th Congress, approved June 30, 1945, (Sec. 1618, 1619 of this Title), but only with respect to programs, projects, or commitments outstanding on June 30, 1947. Sections 618 and 619 relate to purchase and resale of surplus property and limitation on use of corporate funds."

Nothing in the Act referred to any suits or court action or any other litigation except Section 643 which relates to RFC Mortgage Co.

Section 2105 of the New Federal Judicial Code provides as follows:

"There shall be no reversal in the Supreme Court or a court of appeals for error in ruling upon *matters in abatement* which do not involve jurisdiction."

The decree of the Circuit Court of Appeals merely vacated a void judgment in favor of a defunct corporation which was non-existent at the time of the conclusion of the action, and which was terminated by the specific direction of the language of the Act of Congress.

The decree of the Ninth Circuit Court of Appeals, from which this appeal is attempted, was entered April 6, 1948 [R. 426, 427]. A petition for rehearing was attempted to be filed by the alleged attorneys for the then defunct corporation and was denied by the Circuit Court of Appeals May 13, 1948 [R. 428].

Since the corporation was defunct, its attorneys had no jurisdiction to appear in its behalf for it and therefore

the petition, which its denominated a petition for rehearing, was void for lack of jurisdiction of the parties or subject matter or representation by any counsel and the time could not be extended by such attempted petition for rehearing by the appearance of a non-existing corporation, by attorneys unauthorized by the corporation to appear for it. Therefore, the time within which petition for review could be asked in this court lapsed in July of 1948 and could not be, and was not, extended by the alleged petition for rehearing which itself was a nullity under the circumstances.

On August 12, 1948, the time to Petition for Certiorari was extended to October 1, 1948, by the Chief Justice. This was four months and six days after the original decree and 92 days after the order denying rehearing. Section 2101, Federal Judicial Code, subdivision (c) provides that any appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree unless, upon application for writ of certiorari, for good cause, the Supreme Court or a justice thereof allows an additional time not exceeding sixty days. There is therefore a want of jurisdiction of both the corporation and the subject matter thereof and want of jurisdiction on the part of the Solicitor General to appear for the said defunct corporation, or a corporation that has never been a party to this action in the courts below. The petition is therefore a nullity.

Brief Statement of Facts.

Defense Supplies Corporation brought an action against appellant on February 16, 1944, alleging its authority pursuant to an Act of Congress [R. 4] in its right to sue and be sued pursuant to said Act of Congress [R. 4]. However, private attorneys appeared for the corporation, to wit, the law firm of Meyer, Brobeck, Phleger & Harrison of San Francisco [R. 10].

No judgment was entered in the District Court prior to the destruction of the corporation by Congress but the admitted facts show that the Defense Supplies Corporation ceased to exist on July 1, 1945, by virtue of an Act of Congress, June 30, 1945, dissolving that corporation. (Joint resolution of Congress June 30, 1945, c. 215, 59 Stat. 310.)

After the Defense Supplies Corporation ceased to exist, the trial of the case in the District Court, on which the subsequent judgment was first entered, was continued by the filing on July 2, 1945, of a closing brief in the name of the defunct corporation. The attorneys for the defunct corporation admitted in the Circuit Court of Appeals that they knew that the corporation became defunct but did not notify the court, or take any steps to substitute the party. The District Court ordered the case submitted on July 16, 1945 and thereafter, on April 15, 1946, still without any notification by the attorneys for the defunct corporation, the trial court thereafter entered judgment for the non-existent corporation against certain defendants and against the corporation as to one defendant. The defunct corporation purported to appeal to the Circuit Court of Appeals and the appellants herein, the appellants in the Circuit Court, appealed to the Circuit Court, still without

any notification to the Circuit Court by the attorneys for the defunct corporation that it had been dissolved by an Act of Congress.

On September 16, 1946, over a year after its dissolution, the defunct corporation filed, in the Circuit Court of Appeals, its points and authorities on the purported appeal and briefed and argued it, still without notifying the court, and the appellants did likewise. Thereafter the Circuit Court affirmed the judgment in favor of the defunct and non-existent corporation.

All of the judges and their law clerks and all of the parties (except the attorneys for the defunct corporation) were ignorant of the fact that there was a Congressional enactment dissolving the Defense Supplies Corporation on June 30, 1945.

As stated by the Circuit Court of Appeals:

> "As for the attorneys for the defunct corporation, they frankly admit they were aware that they purported to act for the defunct corporation." [R. 398.]

Statutes Involved.

(1) The Joint Resolution of June 30, 1945, c. 215, 59 Stat. 310, as follows:

> "That, notwithstanding any other provision of law, all functions, powers, duties and authority of the corporations hereinafter designated, are hereby transferred, together with all their documents, books of accounts, records, assets, and liabilities of every kind and nature, to Reconstruction Finance Corporation and shall be performed, exercised, and administered by that Corporation in the same manner and to the same extent and effect as if originally vested in Re-

construction Finance Corporation, and the designated corporations are hereby dissolved: Defense Plant Corporation, Metals Reserve Company, Rubber Reserve Company, and Defense Supplies Corporation, created by Reconstruction Finance Corporation pursuant to the Act of June 25, 1940 (54 Stat. 572), and Disaster Loan Corporation, created by the Act of February 11, 1937 (50 Stat. 19), are hereby designated as the corporations to which the joint resolution applies.

"Sec. 2. The Reconstruction Finance Corporation shall assume and be subject to all liabilities, whether arising out of contract or otherwise, of the corporations dissolved by this joint resolution. No suit, action, or other proceeding lawfully commenced by or against any of such corporations shall abate by reason of the enactment of this joint resolution, but the court, on motion or supplemental petition filed at any time within twelve months after the date of such enactment, showing a necessity for the survival of such suit, action, or other proceeding to obtain a determination of the questions involved, may allow the same to be maintained by or against the Reconstruction Finance Corporation.

"Sec. 3. This joint resolution shall take effect on July 1, 1945."

(2) The Reconstruction Finance Corporation Act of 1932, Title 15, Act of January 22, 1932, c. 8, Sec. 1, 47 Stat. 5, repealed by Act of June 30, 1947, c. 166, Title 2, Sec. 206(m).

After the Circuit Court of Appeals had entered a judgment that was void for want of jurisdiction of the parties or the subject matter, the appellants herein, on preparation of the record for certiorari to this Court, discovered

that the Circuit Court of Appeals judgment was entirely void for want of jurisdiction as the Defense Supplies Corporation, for which the attorneys were purportedly acting, had been dissolved by Act of Congress and no longer had any power either to employ counsel, have counsel present, or to be represented in court, and that the purported judgment was for the same reason null and void.

There was no Party Plaintiff. At the time of judgment the plaintiff corporation had been dissolved and the provisions of the Act of Congress, requiring that a motion for supplemental petition be filed within twelve months after the date of the statute, showing a necessity for the survival of such action, had not been complied with. [R. 386, 387, 388.]

After two years and four months attorneys for the non-existent corporations for the first time moved to amend its pleading to substitute the Reconstruction Finance Corporation in place of the Defense Supplies Corporation "as a mere defect of form" [R. 393]. No other ground was set forth in its motion [R. 392, 393]. Their motion to amend was denied.

The Circuit Court granted the appellants' motion to vacate the judgment and dismiss the proceeding as noncompliant with the mandates of Congress. This was in accord with the decisions of this Honorable Court. (*LeCroine v. McAdoo*, 253 U. S. 217, 219; *United States of America Ex Rel. Niels Claussen v. Curran, Commission*, 276 U. S. 590, 72 L. Ed. 720; *Anderson v. Yungkau*, 329 U. S. 482).

Oklahoma Natural Gas Company v. Oklahoma, 273 U. S. 257.

There is, therefore, no conflict in the lower court's decision and those of this Court.

Reasons for Denying the Writ or Affirming the Judgment of the Circuit Court Below.

I.

At the outset, it must be asserted that there are no parties plaintiff before this Court.

The Defense Supplies Corporation was abolished by Act of Congress on June 30, 1945, c. 215, Public Law 109, 59 Stats. 310. The Reconstruction Finance Corporation has never become a party to the action. This Court, then, is without jurisdiction to grant the writ.

No more sanctity is given to the petition by reason of its having been filed by the Solicitor General than if it had been filed by the previous private attorneys allegedly representing the defunct corporation.

Furthermore, the Reconstruction Finance Corporation had a limited life, which terminated prior to the new act establishing a Reconstruction Finance Corporation on June 30, 1947. This new corporation did not take over the debts or liabilities, or the assets of the Defense Supplies Corporation, or the lawsuits of the Reconstruction Finance Corporation.

This Court always looks into its own jurisdiction before acting.

Jurisdiction cannot be conferred by consent.

Mitchell v. Maurer, 293 U. S. 237, 244;

City of Gainsville v. Brown Crummer Co., 277 U. S. 54, 59;

Ross v. White, 32 F. 2d 750.

Filing a petition in this court does not create jurisdiction. This requires no citation and authorities.

Since the Defense Supplies Corporation is non-existent and the Reconstruction Finance Corporation is not a party in the action, the petition for the writ should be dismissed for want of jurisdiction.

It is axiomatic, also, that the mode of procedure specified by the Act of Congress is the measure of power of the courts in these matters. Congress specified both the mode and the measure of power, as follows:

> "That no suit, action, or other proceeding lawfully commenced by or against any of such corporations shall abate by reason of the enactment of this joint resolution, but the court, on motion or supplemental petition filed at any time within twelve months after the date of such enactment, showing a necessity for the survival of such suit, action, or other proceeding to obtain a determination of the questions involved, may allow the same to be maintained by or against the Reconstruction Finance Corporation."

Thus, Congress has specifically limited the manner and time within which a motion or supplemental petition may be filed, to-wit: (1) Within twelve months after the effective date of the enactment, to-wit, within 12 months after July 1, 1945; (2) Showing a necessity for the survival of such suit, action, or other proceeding; (3) Requiring the court, upon such petition within such time and such showing, if the court is satisfied that a satisfactory showing has been made, to allow the same to be main-

tained by or against the Reconstruction Finance Corporation (not the United States of America).

It is thus apparent that Congress put in a provision or Statute in repose to abate proceedings and to require timely action, either by or against the corporation, and to end suits which may effect the Defense Supplies Corporation within twelve months after July 1, 1945. These provisions were known to the counsel for the defendant corporation. They did not comply with these statutory and mandatory requirements.

Furthermore, the Reconstruction Finance Corporation, as organized in 1932, and under which the Defense-Supply Corporation was founded, lapsed by reason of the terms of its creation in 1947. It was superseded by a new corporation with an entire new Act of Congress, with no provision remaining for or against the old corporation.

It is for Congress to express the policy and jurisdiction of the courts—and, it is axiomatic that Congress may grant or withdraw jurisdiction from the courts, or provide the manner in which the courts have jurisdiction, and the extent to which they have jurisdiction.

Yakus v. United States, 320 U. S. 730, 88 L. Ed. 431;

Willingham v. Bowles, 321 U. S. 503, 88 L. Ed. 892.

The New Federal Judicial Code also provides:

"There shall be no reversal in the Supreme Court or a court of appeals for error in ruling upon matters in abatement which do not involve jurisdiction."

Section 2105, New Federal Judicial Code.

There is no conflict between the decision of the Circuit Court of Appeals and this court. The decision of the Circuit Court is in accord with the previous decisions of this court, holding that the mandates of Congress must be fulfilled or the case must lapse.

This court so held in the case of *LaCrone v. McAdoo*, 253 U. S. 217, *Payne v. Industrial Board of Illinois*, 258 U. S. 618, and *United States Ex Rel. Claussen v. Curran*, 276 U. S. 590, and in *Anderson v. Yungkau*, 329 U. S. 482.

Congress has copied into the present statute the same provisions that were in the Act of Congress of February 9, 1889, which were interpreted in the case of *LaCrone v. McAdoo*, 253 U. S. 217, 219, wherein this court dismissed that action for want of jurisdiction. The time provisions of the New Federal Rules, Rule 25(c), which are, of course, superseded by the specific Act of Congress, nevertheless provides for a strict time interpretation and were so held by this court in *Anderson v. Yungkau*, 329 U. S. 482.

The Reconstruction Finance Corporation Act of June 30, 1947, adopted on June 30, 1947, ch. 166, Title 1, Sec. 13, 61 Stat., has only one provision for the transfer of assets and liabilities and for the continuation of lawsuits and that is with reference to the R. F. C. Mortgage Company, a corporation organized under the laws of the State

of Maryland, owned and held by the Reconstruction Finance Corporation. The Act supersedes and repeals all previous acts, with no provision whatsoever for the continuation of any obligation of the previous Act.

Contrary to the contentions of the Solicitor General (quoting from Judge Healy) it would be an unconscionable result for this court to assume jurisdiction in the case where Congress has deprived it of jurisdiction and an unconscionable thing to permit counsel for a defunct Government Corporation to continue litigation for two years and four months, for a company that was non-existent and which it knew was non-existent, without taking the mandatory steps which Congress has decreed would be necessary. Congress, not the court, is the determiner of the mode and manner of jurisdiction and the expiration thereof.

No construction is therefore necessary of the joint resolution of June 30, 1945, as it has been fully and correctly construed by the Ninth Circuit Court of Appeals, and no important question is present, nor is there any jurisdiction to proceed further in the matter.

The decision of the Eighth Circuit Court of Appeals, while against the Government, shows the danger of the decision sought for by the attorneys for the defunct corporation.

What is sauce for the goose is sauce for the gander and could well open up many cases which have now been terminated by the specific Act of Congress and apparently meant to be so, and the interpretation placed upon this case by the Ninth Circuit Court of Appeals correctly interprets the law in accord with the decisions of this court.

The Government argues that the Reconstruction Finance Corporation is really the United States and that the United

States is the real party in interest. However, Government corporations, when they act in private capacities, are considered in the same light as private corporations and they garner no additional right because they are formed as government corporations. The duration and powers of the corporation are set up in the Act of Congress creating it and permitting it to sue and be sued, and creating a Board of Directors and similar rights and duties as any private corporation. One could not sue the United States for something growing out of acts of the Defense Supplies Corporation or the Reconstruction Finance Corporation.

Equity rules which the Solicitor General urges upon this court cannot take the place of the laws of Congress nor of the lack of jurisdiction of this court. This action was an action at law. Statutes of limitation have always been deemed necessary and wise. The law gave a reasonable time to substitute under conditions therein set out, twelve months, under rule 25, Rules of Civil Procedure, only 6 months is allowed. In O.P.A. cases only two months was permitted to seek a review and this was upheld as fulfilling reasonableness and due process. *Yakus v. U. S.*, and *Willingham v. U. S.* (*supra*). Congress has expressed the legal rights and duties and declared what is equitable. This court would have no power to order any judgment to be entered *nunc pro tunc*. Its public interest requires that private litigants dealing with a corporation such as Defense Supplies or R.F.C. be dealt with and treated the same as any private corporation.

The assertion, by the Solicitor General, unsupported by any facts in the record, that there was a body of litigation pending on July 1, 1945, by and against the corporations named in the Joint Resolution of June 30, 1945, and

that this decision of the Ninth Circuit Court may be a basis to have the judgments below vacated, could not be applicable now in view of the Act of Congress of June 25, 1948, providing that "there shall be no reversal in the Supreme Court or a court of appeals for error in ruling upon matters in abatement." (Sec. 2105, New Federal Judicial Code.)

Furthermore, if the decision of the Ninth Circuit Court is not to stand any litigant could come in now and seek rights against the Reconstruction Finance Corporation which they have thought terminated by reason of the Act of Congress requiring substitution of parties within twelve months where the action is terminated.

The statement of the Ninth Circuit Court regarding the case of *Fix v. Philadelphia Barge Co.*, 290 U. S. 530, answers the petitioner's assertion that the United States is the real party in interest and therefore the substitution may be ordered. In the *Fix* case, the court says:

> "Answers the contention much urged, that the United States owning the stock of Defense Supplies Corporation is the real party in interest in a recovery of damages against appellants. In that sense so was the United States, with its Collector Fix suing for taxes for the Federal Treasury in his 'official capacity' as tax collector."

See also:

Reconstruction Finance Corp. v. Jr. Member Corp., 312 U. S. 81, 85 L. Ed. 595.

The Defense Supplies Corporation and the Reconstruction Finance Corporation were organized by Congress, to be treated like any other private corporation.

The Capitol Chevrolet Company incorporates by reference as part of this opposition all matters set out by Lawrence Warehouse Company in its opposition.

The Ninth Circuit Court Opinion is an able decision by Judge Denman, concurred in by the learned Judge Homer Bone, himself a former Senator of the United States, with a keen understanding of congressional powers.

WHEREFORE, Capitol Chevrolet Company prays that this Honorable Court dismiss the Petition for the Writ for want of jurisdiction (a) of the parties, (b) of the subject matter, (c) because it is in accordance with previous rendered decisions of this honorable court, (d) because the scope of review is forbidden by the Judicial Code, Section 2105; or affirm the judgment below on the basis of the cases heretofore decided by this Honorable Court.

Respectfully submitted,

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Attorney for Capitol Chevrolet Company.